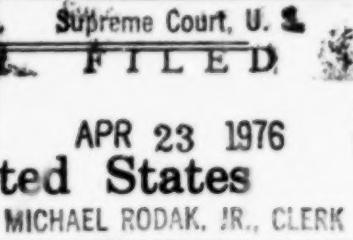


In The
Supreme Court of the United States
OCTOBER TERM, 1975



No. 75-1545

STATE OF KANSAS,
Petitioner,

vs.

THOMAS LEO McCORGARY,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS**

CURT T. SCHNEIDER
Attorney General of Kansas

JOHN R. E. MARTIN
Assistant Attorney General
State House
Topeka, Kansas 66612

KEITH SANBORN
District Attorney
18th Judicial District of Kansas

STEPHEN M. JOSEPH
Assistant District Attorney
533 County Courthouse
525 North Main
Wichita, Kansas 67203
Attorneys for Petitioner

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No. _____

STATE OF KANSAS,

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vs.

THOMAS LEO McCORGARY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS**

Petitioner, the State of Kansas, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas entered in this case on December 13, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas is reported at 218 Kan. 358, 543 P.2d 952, and is included as Appendix A. A timely motion for rehearing was denied on January 28, 1976, and the order of denial is included as Appendix B.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on December 13, 1975. A timely motion for rehearing was denied on January 28, 1976. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the introduction at trial of respondent's voluntary incriminating statements made to another jail inmate, after criminal prosecution had commenced, violate respondent's Sixth Amendment right to assistance of counsel because respondent and the inmate were confined together at the request of a police officer so that the inmate could listen for statements by respondent concerning the location of the murder victim's body, even though the incriminating statements were made in conversations initiated by respondent and the inmate did not interrogate respondent or elicit the statements in any way?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this petition involves is as follows:

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Statement of Facts

For several months before July, 1972, respondent and Karl Williams worked together at the Pinsker Steel Company plant in Wichita, Kansas. They became close friends and were frequently together. On July 15, 1972, respondent and Williams went to the home of Mary Pace in Wichita; she was respondent's girl friend. Respondent and Williams left about noon to get a beer. Williams was never again seen alive. Respondent returned to Miss Pace's home a few hours later. He was covered with blood. The next day another Pinsker Steel employee saw respondent washing blood from inside Karl Williams' car.

Early in October, 1972, Karl Williams' sister, Irene Eaton, came to Wichita to search for her brother. She had not heard from him in several months and was worried that something had happened to him. Respondent was one of the persons with whom Mrs. Eaton talked. When she was unable to find any trace of her brother, she went to the Wichita Police Department and reported his disappearance. An investigation was started. As a result of evidence gathered during that investigation, a complaint was sworn and an arrest warrant issued for respondent on March 21, 1973, charging him with the first degree murder of Karl Williams. Respondent later was also charged with the aggravated robbery of Williams. Respondent was arrested on March 21 and confined in the Sedgwick County jail.

At the time of the arrest, Karl Williams' body had not been found and would not be found for six more days.

Before respondent was placed in the county jail on March 21, Police Captain Floyd Williamson contacted Sheriff's Captain Charles Lutkie and requested his assistance. Lutkie was in charge of the county jail. Williamson told Lutkie that the police still were attempting to locate Karl Williams' body. He asked Lutkie if he would put respondent in a cell with an inmate who would be willing to report any statements made by respondent concerning the location of Williams' body. Lutkie agreed to assist and in turn talked with David L. Elliott, an inmate who had just been sentenced to imprisonment and was awaiting transfer to a state corrections facility. Lutkie explained to Elliott that the police were interested in any information which respondent might reveal about the location of a body. He did not give Elliott any instructions on what to do and he did not promise Elliott anything in return for his help. Elliott agreed to help. On March 22, Captain Lutkie transferred respondent into the eight-man cell where Elliott was confined. The same day an attorney was appointed to represent respondent on the murder charge. The attorney was not told that Elliott had been requested to listen for and report respondent's statements about the location of Karl Williams' body. Shortly before his arrest on March 21, respondent was interrogated by a Wichita police detective concerning Williams' disappearance. Before the interrogation, respondent was fully warned of his constitutional rights in accordance with the *Miranda* decision and respondent acknowledged his understanding of those rights.

Respondent and Elliott had several conversations between March 22 and March 30, the day Elliott was

transferred to a state corrections facility. All the conversations were initiated by respondent. At no time did Elliott question or interrogate respondent about the murder charge or elicit statements from respondent in any way. Most of the conversations occurred late at night or early in the morning when the other inmates in the cell were asleep or during the day when respondent could get Elliott by himself in the dayroom.

Elliott was known as a "jailhouse lawyer" and respondent came to him with legal questions about the murder charge. Shortly after respondent was incarcerated, he asked Elliott whether he could be convicted of murder if the body of the victim was never found. Elliott told him that he could be convicted. Respondent then commented that he doubted they could find the body anyway. At a later time, respondent asked Elliott what the police would need to identify a body. Elliott told him that a body could be identified by such things as dental records, dentures, and body deformities. Respondent commented that the man had dentures. Karl Williams did have dentures. Still later, respondent told Elliott that he was going to have to get rid of some people, including Karl Williams' sister.

On March 27, 1973, Karl Williams' body was found buried in a shallow grave behind the Pinsker Steel plant where he and respondent worked. The discovery was the result of information provided by another Pinsker employee. When respondent learned of the discovery on a radio in the jail, he went to Elliott and announced: "I am sunk now. They found the body." Not giving up hope, however, respondent suggested to Elliott that the police might not be able to identify the body. In the next day or two, respondent told Elliott

that he had "bashed in" Williams' skull and buried his body behind the plant.¹

On October 1, 1973, respondent's trial before a jury commenced in the District Court of Sedgwick County, Kansas. Over the objection of respondent, David L. Elliott testified before the jury about the statements respondent made to him while they were in jail together.² On October 15, the jury returned verdicts of guilty of second degree murder and aggravated robbery. Respondent was sentenced as a habitual criminal to imprisonment for not less than 45 years nor more than his natural life on each charge.

B. How the Federal Question Arose

Following a preliminary examination before a magistrate at which David L. Elliott testified, respondent was bound over for trial in the Sedgwick County District Court on charges of first degree murder and aggravated robbery. Two weeks before trial, respondent filed a motion in the district court seeking suppression of Elliott's testimony. Respondent alleged in his motion that Elliott was acting as a state agent while in the cell with respondent; he claimed that Elliott's failure to advise respondent of his constitutional rights as re-

1. During this same time period, respondent revealed information to Elliott about three other murders committed by respondent, all of which were unrelated to the killing of Karl Williams. Based on this information and other evidence, respondent was charged and convicted of three first degree murders. Elliott testified in respondent's trial on those charges. That conviction is pending on appeal to the Supreme Court of Kansas.

2. Since Karl Williams' body was discovered through information from another source, no police officer contacted Elliott until several weeks after his transfer to a state corrections facility. Only then was it learned that respondent had made the incriminating statements to Elliott.

quired by the *Miranda* decision precluded introduction in evidence of any of respondent's statements to Elliott (R. 4).³ This motion was heard and denied by the district court administrative judge.

Respondent's trial commenced on October 1, 1973. After selection of the jury, respondent renewed his motion before the trial court to suppress Elliott's testimony (R. 23, 28-29). A hearing on the motion was held outside the jury's presence. Captain Williamson (R. 29-34), Captain Lutkie (R. 35-45), and Elliott (R. 46-58) testified. Following that testimony, respondent argued that Elliott was acting as a state agent when he was with respondent; that Elliott had the same responsibility as a police officer to inform respondent of his constitutional rights under the *Miranda* decision before questioning respondent; and that Elliott's failure to do so barred any evidentiary use by the state of respondent's statements to Elliott (R. 59-62). The trial court denied respondent's motion ruling that respondent's statements were voluntary and, since Elliott did not interrogate or question respondent, he had no constitutional obligation to inform respondent of his rights (R. 62-63).

On appeal to the Supreme Court of Kansas, respondent first relied on the exclusionary rule of *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), arguing that Elliott's pre-arranged presence in the cell with respondent violated his Sixth Amendment right to assistance of counsel. The supreme court found that argument persuasive. The supreme

3. The Record on Appeal to the Supreme Court of Kansas has been certified and transmitted to the Clerk of this Court. References are to the pages of the Record as certified.

court assumed that the trial court properly found that Elliott did not interrogate respondent or elicit information from him, but ruled "that interrogation or the lack of it does not determine the admissibility question" (A8). The sole fact that respondent and Elliott's confinement in the same cell had been pre-arranged by a police officer was held controlling on the question of the admissibility of Elliott's testimony. Concluding that this "surreptitious arrangement" undercut respondent's constitutional right to counsel, the supreme court held that Elliott's testimony was inadmissible under the rule of *Massiah* (A8-A9) and reversed respondent's conviction with directions to grant him a new trial.

REASONS FOR GRANTING THE WRIT

The question presented by petitioner is a substantial federal constitutional question focusing squarely on the Sixth Amendment right to the assistance of counsel as recognized and applied in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). Resolution of this question is essential (1) to clarify the meaning of this Court's per curiam decisions in *McLeod v. Ohio*, 381 U.S. 356, 85 S. Ct. 1556, 14 L. Ed. 2d 682 (1965), and *Beatty v. United States*, 389 U.S. 45, 88 S. Ct. 234, 19 L. Ed. 2d 48 (1967), (2) to settle conflicting interpretations of the *Massiah* exclusionary rule by the United States Courts of Appeals, and (3) to provide guidance for both state and federal law enforcement officers concerning the constitutionally permissible scope of an investigation following the commencement of a criminal prosecution.

Twelve years ago this Court in *Massiah v. United States, supra*, prohibited the evidentiary use of an ac-

cused's "own incriminating words" which had been "deliberately elicited from him" by the surreptitious interrogation of a federal agent-informer after the accused "had been indicted and in the absence of counsel." Several days after his indictment on federal narcotics charges, Winston Massiah, who had retained counsel, had a conversation with a co-defendant in the co-defendant's car. The co-defendant, then acting as a federal agent-informer, interrogated Massiah who made several incriminating statements. These statements were transmitted to a federal officer by a radio concealed in the car with the co-defendant's permission. Massiah was unaware that the co-defendant was cooperating with the federal officer and of the presence of the radio. His incriminating statements were used against him at trial. This Court reversed Massiah's conviction on the ground that the use of the statements violated his Sixth Amendment right to assistance of counsel.

The particular facts of *Massiah* were given controlling significance by the closing language of Mr. Justice Stewart's opinion for the Court:

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

377 U.S. at 207, 84 S. Ct. at 1203, 12 L. Ed. 2d at 251 (emphasis added, in part). Since that decision

was handed down, Mr. Justice Stewart's closing language "has often been interpreted as meaning that the exclusionary rule of *Massiah* was not meant to apply to all incriminating statements made under any circumstances by an accused without counsel after indictment but applied only to such statements when induced or deliberately elicited by officers or their agents from an accused after indictment and in the absence of counsel." *Hancock v. White*, 378 F.2d 479, 482 (1st Cir. 1967). The "special circumstances" interpretation of *Massiah* is well illustrated by *United States v. Gardner*, 347 F.2d 405 (7th Cir. 1965), cert. denied, 382 U.S. 1015, 86 S. Ct. 626, 15 L. Ed. 2d 529 (1966); *United States v. Accardi*, 342 F.2d 697 (2nd Cir.), cert. denied, 382 U.S. 954, 86 S. Ct. 426, 15 L. Ed. 2d 359 (1965); *United States v. Garcia*, 377 F.2d 321 (2nd Cir.), cert. denied, 389 U.S. 991, 88 S. Ct. 489, 19 L. Ed. 2d 484 (1967).

Two per curiam decisions of this Court in the years following *Massiah* have resulted in conflicting interpretations of the *Massiah* exclusionary rule by the United States Courts of Appeals for the First, Second, Third, Fifth, Seventh, and Ninth Circuits: *McLeod v. Ohio*, *supra*, and *Beatty v. United States*, *supra*. Those cases will be discussed briefly.

The defendant in the *McLeod* case was indicted on October 3, 1960, for murder in the first degree. On October 11, the defendant voluntarily confessed to the murder in the presence of a deputy sheriff and an assistant prosecuting attorney while they were riding in a car searching for the gun used in the murder-holdup. The defendant was not then represented by counsel. The confession was admitted at the defendant's trial

and he was convicted. The conviction was affirmed by the Ohio Court of Appeals and an appeal to the Ohio Supreme Court was dismissed for the reason that there was no debatable constitutional question involved. *State v. McLeod*, 173 Ohio St. 520, 184 N.E.2d 101 (1962). After granting certiorari, this Court reversed that decision and remanded the case to the Ohio Supreme Court for consideration in light of *Massiah*. *McLeod v. Ohio*, 378 U.S. 582, 84 S. Ct. 1922, 12 L. Ed. 2d 1037 (1964). On reconsideration, the Ohio court affirmed the conviction. *State v. McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964). Focusing on Mr. Justice Stewart's closing language in *Massiah*, the Ohio Supreme Court found numerous controlling factual differences in the two cases: (1) the defendant had not retained or requested counsel, but *Massiah* had retained counsel; (2) the defendant had not been arraigned on the indictment, but *Massiah* had been arraigned and released on bail; (3) the defendant's statements were made willingly in the known presence of public officers, but *Massiah* had been interrogated without knowing that his co-defendant was acting as a federal agent-informer and that the conversation was being overheard by a federal officer. The dissenting opinion also observed that the defendant had not been advised of his right to counsel and that the defendant had both a statutory and constitutional right to counsel before arraignment. Neither the majority nor the dissenting opinion mentioned whether the defendant was being questioned when he confessed. A fair reading of the opinion in that case, however, suggests that the defendant was questioned by the officers while they were searching for the weapon. This Court again granted certiorari and reversed citing *Massiah*. *McLeod*

v. Ohio, 381 U.S. 356, 85 S. Ct. 1556, 14 L. Ed. 2d 682 (1965).

Two years after the *McLeod* decision, this Court announced its per curiam decision in *Beatty*. In that case the defendant was indicted for possession and transfer of a machine gun. Shortly after the indictment was returned, the defendant telephoned the man to whom he sold the machine gun and requested a meeting. The defendant did not then know that the man was acting as a federal agent-informer when he purchased the gun. The informer contacted a federal officer and was told to attend the meeting. The meeting took place in the informer's car and the federal officer was secreted in the trunk. The defendant made certain incriminating statements during that meeting, including threatening the informer if he should appear against the defendant. The statements were voluntary, were not the product of interrogation, and were not elicited or induced by the informer. The informer and the officer testified at trial regarding the defendant's statements. On appeal from his conviction, the defendant argued that introduction of his statements violated the *Massiah* exclusionary rule. The court of appeals found the facts of *Beatty* did not warrant application of the *Massiah* rule. *Beatty v. United States*, 377 F.2d 181, 188 (5th Cir. 1967). Quoting Mr. Justice Stewart's closing language in *Massiah*, the court of appeals held: "We interpret this language as meaning that the exclusionary rule does not apply to all incriminating statements made under any circumstances by an accused after his indictment, but such rule only applies to those statements induced or deliberately elicited by officers or their agents from the accused after his indictment while he is without

assistance of counsel." 377 F.2d at 189. This Court granted certiorari and reversed citing *Massiah*. *Beatty v. United States*, 389 U.S. 45, 88 S. Ct. 234, 19 L. Ed. 2d 48 (1967).

Relying on this Court's per curiam decision in *McLeod*, the United States Courts of Appeals for the First and Third Circuits have broadly interpreted *Massiah* to apply to all instances where an accused makes a post-indictment statement to an officer or agent in the absence of counsel. *Hancock v. White*, 378 F.2d 479 (1st Cir. 1967); *United States ex rel. O'Connor v. New Jersey*, 405 F.2d 632 (3rd Cir.), cert. denied sub nom., *Yeager v. O'Connor*, 395 U.S. 923, 89 S. Ct. 1770, 23 L. Ed. 2d 240 (1969). Relying on both *McLeod* and *Beatty*, the United States Court of Appeals for the Seventh Circuit also has broadly interpreted *Massiah*. *United States ex rel. Milani v. Pate*, 425 F.2d 6 (7th Cir.), cert. denied, 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 107 (1970).

This expansive reading of *Massiah*, however, is not uniform. The United States Courts of Appeals for the Second, Fifth, and Ninth Circuits still follow the "special circumstances" interpretation of the pre-*McLeod* cases. *United States v. Gaynor*, 472 F.2d 899 (2nd Cir. 1973); *United States v. Garcia*, 377 F.2d 321 (2nd Cir.), cert. denied, 389 U.S. 991, 88 S. Ct. 489, 19 L. Ed. 2d 484 (1967); *United States v. Hayles*, 471 F.2d 788 (5th Cir.), cert. denied, 411 U.S. 969, 93 S. Ct. 2159, 36 L. Ed. 2d 690 (1973); see *Williams v. Nelson*, 457 F.2d 376 (9th Cir. 1972).

The divergent interpretations of *Massiah* in post-*McLeod* cases has been expressly recognized by the United States Court of Appeals for the Fifth Circuit.

United States v. DeLoy, 421 F.2d 900 (5th Cir. 1970). State appellate courts also have recognized the existence of conflicting interpretations of *Massiah* in the federal courts of appeals. E.g., *State v. Hatton*, 95 Idaho 856, 522 P.2d 64 (1974); *Commonwealth v. Frongillo*, 268 N.E.2d 341 (Mass. 1971); *State v. Chabonian*, 50 Wis. 2d 574, 185 N.W.2d 289 (1971); *Commonwealth v. French*, 259 N.E.2d 195 (Mass. 1970); *People v. Milani*, 39 Ill. 2d 22, 233 N.E.2d 398 (1968). Some state courts have adopted the broad reading of *Massiah* while others have found the restrictive "special circumstances" interpretation more persuasive. This conflict can only be resolved by this Court addressing the question presented here by petitioner.

Further confusion concerning the scope of *Massiah* has been generated by this Court's action in *Miller v. California*, 392 U.S. 616, 88 S. Ct. 2258, 20 L. Ed. 2d 1332 (1968). In that case the Supreme Court issued a writ of certiorari to a California district court of appeal and then dismissed the writ as improvidently granted. Mr. Justice Marshall, joined by three other members of the Court, dissented in a lengthy opinion. The petitioner in *Miller* was convicted of murder. One of the state witnesses was a police officer planted in petitioner's jail cell after her arrest. The witness testified at trial regarding statements made to her by petitioner while they were confined together. On appeal from her conviction, petitioner challenged the introduction of the officer's testimony. Noting that *Massiah* was probably applicable, nevertheless, the California district court of appeal ruled that the testimony was not prejudicial and that a timely objection had not been made at trial. *People v. Miller*, 245 Cal. App. 2d 112,, 53 Cal. Rptr. 720, 738-40 (Dist. Ct. App. 1966).

Mr. Justice Marshall, in his dissent from the dismissal of the writ, argued that the issue had been properly preserved by petitioner and that the facts of the case demonstrated a violation of *Massiah*. It has been suggested in a state appellate court that the dismissal of the writ in *Miller* signaled a contraction of *Massiah*. *State v. Smith*, 107 Ariz. 100,, 482 P.2d 863, 868 (1971) (concurring opinion). On the other hand, it has been suggested in another state appellate court that Mr. Justice Marshall's dissenting opinion confirmed that the broad reading of *Massiah* was the one intended by this Court. *State v. Chabonian*, 50 Wis. 2d 574, 185 N.W.2d 289 (1971) (dissenting opinion).

In short, in the twelve years since *Massiah* was decided, the scope of the constitutional principle of that case has become the subject of debate and doubt generated by this Court's later decisions in *McLeod v. Ohio*, *Beatty v. United States*, and *Miller v. California*. The question presented by this petition, on a record having no disputed facts, gives this Court an opportunity to resolve the debate and end all doubts regarding the scope of the exclusionary rule announced in *Massiah*.

CONCLUSION

Petitioner respectfully prays the Supreme Court to grant this petition for the purpose of (1) clarifying the meaning of this Court's decisions in *McLeod v. Ohio*, *supra*, and *Beatty v. United States*, *supra*, (2) settling conflicting interpretations of the *Massiah* exclusionary rule in the United States Courts of Appeals, (3) providing guidance for both state and federal law enforcement officers concerning the constitutionally permissible scope of an investigation following the commencement of a

criminal prosecution, and (4) preventing the exclusion of vital, relevant evidence as the result of a misreading of *Massiah* by the Kansas Supreme Court.

Respectfully submitted,

CURT T. SCHNEIDER
Attorney General of Kansas

JOHN R. E. MARTIN
Assistant Attorney General

KEITH SANBORN
District Attorney
18th Judicial District of Kansas

STEPHEN M. JOSEPH
Assistant District Attorney
Chief, Law Division

Attorneys for Petitioner

APPENDIX A

No. 47,813

STATE OF KANSAS,
Appellee,

v.

THOMAS LEO McCORGARY,
Appellant.

(Filed December 13, 1975)

SYLLABUS BY THE COURT

1. In Kansas a criminal prosecution may be deemed commenced upon filing complaint and issuance of warrant.
2. After a criminal prosecution has been commenced a defendant is as much entitled to aid of counsel as at the trial itself, absent a voluntary and knowing waiver.
3. When the police or other state officers surreptitiously place a defendant in a cell with an informer for the purpose of obtaining information concerning pending charges in the absence of counsel, such action by the police contravenes the basic dictates of fairness in the conduct of criminal causes and violates the fundamental rights afforded by the presence of counsel. (Following *Massiah v. United States*, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199.)
4. The testimony of a police informer concerning incriminating statements made by the defendant while in jail pending charges is not admissible at defendant's trial if the information has been surreptitiously obtained by prior arrangements between the police and the informer.

5. The record of conviction on aggravated robbery and second degree murder charges is examined and it is *held*: (1) The trial court erred in failing to suppress the testimony of a police informer; (2) The court did not err in permitting the jurors to view a scene of the crime; (3) The court erred in instructing the jury on evidence tending to show consciousness of guilt; (4) No instruction on certain lesser included crimes was required by the evidence; (5) The two verdicts returned on separate crimes were not irreconcilable and should not be reversed on grounds of inconsistency; (6) No instruction on the defense of intoxication was required by the evidence; (7) The newspaper publicity before the trial did not *per se* justify a change of venue; and (8) The court did not err in overruling a motion for acquittal.

Appeal from Sedgwick district court, division No. 9, DAVID P. CALVERT, judge. Opinion filed December 13, 1975. Reversed and remanded with directions.

The opinion of the court was delivered by

FROMME, J.: Thomas Leo McCorgary appeals from two convictions, second degree murder (K.S.A. 21-3402) and aggravated robbery (K.S.A. 21-3427).

Appellant's first point of error concerns the admission in evidence of the testimony of David Elliott, a police informer, with whom appellant was incarcerated while awaiting trial on the criminal charges. Elliott by prior arrangement with the police agreed to obtain information from McCorgary concerning the whereabouts of the murder victim's body and any other information that might be helpful to the prosecution. This prior secret arrangement was made after a complaint had been filed and warrant had been issued. When Mc-

Corgary was arrested he was taken before a magistrate and an attorney was appointed for him. He was then placed in an eight man cell. Elliott was one of his cellmates. During the next few days Elliott made friendly overtures to McCorgary. Elliott was a person who might be referred to as a "jailhouse lawyer". He gave free advice to other cellmates on their legal problems. During this time another cellmate asked Elliott about his legal problems. Thereafter McCorgary sought his advice and asked Elliott if the police could convict a person of murder if they couldn't find the body of the victim. Later McCorgary heard a radio report that the body of Karl Williams had been found. He became agitated, sought out Elliott and asked what the police would need to identify a body. Elliott then obtained a number of incriminating statements from McCorgary including a verbal confession in which McCorgary disclosed he had killed Williams by striking him on the head with a steel rod and had buried the body in a grove of trees near the steel plant where he and Williams had been employed. He admitted taking the victim's car.

Prior to trial appellant McCorgary filed a motion to suppress Elliott's testimony. The motion was denied. At the trial appellant renewed his objection to Elliott's testimony. A hearing, as required by K.S.A. 22-3215, was held to determine the admissibility of the testimony. The trial court determined that these oral statements made to Elliott were voluntary and not a product of interrogation on Elliott's part. They were admitted in evidence through the testimony of Elliott.

On appeal appellant contends that Elliott's statement should have been suppressed under the rule announced by the Supreme Court of the United States

in *Massiah v. United States*, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199. Appellant's argument is persuasive.

In *Massiah* the defendant had been arrested and indicted on a federal narcotics charge. While free on bail Massiah engaged in conversation with a co-defendant who had previously agreed to cooperate with the narcotic agents. This conversation was surreptitiously monitored by a federal agent. The agent testified at trial and recounted Massiah's incriminatory admissions made during the conversation between Massiah and the co-defendant. On appeal the testimony of the agent who monitored the conversation was ordered suppressed by the Supreme Court for the reason that Massiah was denied his Sixth Amendment right to assistance of counsel. In *Massiah* the Supreme Court, speaking of the Sixth Amendment right to assistance of counsel, stated:

" . . . We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. . . ." (377 U.S. at p. 206.)

In ordering the testimony of the government agent suppressed, the Supreme Court relied on *Spano v. New York*, 360 U.S. 315, 3 L.Ed.2d 1265, 79 S.Ct. 1202. The *Massiah* court stated that, although the Spano confession was suppressed on the totality of the circumstances, four concurring Justices had pointed out in a concurring opinion that the constitution required reversal of the Spano conviction upon the sole and specific ground that the confession had been deliberately

elicited by the police after the defendant had been indicted, and therefore at a time when Spano was clearly entitled to a lawyer's help. It was stated that under our system of justice the most elemental concepts of due process of law contemplate that, after an indictment is found, a defendant is entitled to the protection of all procedural safeguards, including the aid of counsel. Any secret interrogation of the defendant from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and violates the fundamental rights of a person charged with crime.

In Kansas a criminal prosecution may be deemed commenced upon filing complaint and issuance of warrant. (*State v. Cashman*, 174 Kan. 272, Syl. ¶ 3, 255 P.2d 660; *State v. Hemminger*, 210 Kan. 587, Syl. ¶ 2, 502 P.2d 791.) After a criminal prosecution has been commenced a defendant is as much entitled to aid of counsel as at the trial itself, absent a voluntary and knowing waiver. K.S.A. 22-4503 provides:

"A defendant charged by the State of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against him. . . ."

In *State v. Melton*, 207 Kan. 700, 486 P.2d 1361, and *State v. Armstrong*, 207 Kan. 681, 486 P.2d 1322, it is pointed out that a defendant may effectively waive the right to counsel but to be an effective waiver the record must plainly show the accused intelligently and understandingly rejected the assistance of counsel. It can hardly be said that a voluntary and knowing

waiver of the assistance of counsel occurred under the circumstances of this case where by secret prearrangement the accused is placed in a cell with a police informer.

The state in the present case contends that the "Massiah exclusionary rule" applies only to post-indictment statements which are deliberately elicited by police officers or their agents. The state further argues that there was no interrogation of McCorgary by Elliott, and that the trial court's findings that Elliott neither interrogated nor elicited information from appellant are binding on this court. We will assume the court's findings on this subject are supported by substantial evidence and accept the latter premise.

Before examining the question it should be noted the exclusionary rule declared in *Massiah* does not apply to voluntary statements of a defendant which are made to private citizens. (*People v. Smith*, 5 Ill.App.3d 642, 283 N.E.2d 736.) It has been held that if a defendant is injudicious in his conversations with fellow prisoners and the latter without prior arrangements with the police take it upon themselves to tell police officials of these conversations such conversations are admissible in evidence. (*United States v. Aloisio*, 440 F.2d 705 [7th Cir. 1971], cert. den. 404 U.S. 824, 30 L.Ed.2d 51, 92 S.Ct. 49; *United States v. Casteel*, 476 F.2d 152 [10th Cir. 1973]; *Milani v. Pate*, 425 F.2d 6 [7th Cir. 1970], cert. den. 400 U.S. 867, 27 L.Ed.2d 107, 91 S.Ct. 109.)

In support of its position, that the "Massiah exclusionary rule" does not apply to voluntary post-indictment statements made to a police informer, the state cites *People v. Lopez*, 60 Cal.2d 223, 32 Cal. Rptr.

424, 384 P.2d 16 (1963), cert. den. 375 U.S. 994, 11 L.Ed.2d 480, 84 S.Ct. 634, rehr. den. 376 U.S. 939, 11 L.Ed.2d 660, 84 S.Ct. 794. Certiorari was denied in that case on January 1, 1964. A rehearing was denied on March 2, 1964. *Massiah* was decided May 18, 1964. The denial of certiorari and rehearing in *Lopez* is not persuasive since *Massiah* was subsequent thereto and the new rule would not apply to that decision.

The cases of *State v. McLeod*, 1 Ohio St.2nd 60, 203 N.E.2d 349, and *Beatty v. United States*, 377 F.2d 181 (5th Cir. 1967) are of interest. *McLeod* was reversed in a memorandum decision by the Supreme Court in *McLeod v. Ohio*, 381 U.S. 356, 14 L.Ed.2d 682, 85 S.Ct. 1556, and *Beatty* was reversed in a similar decision in *Beatty v. United States*, 389 U.S. 45, 19 L.Ed.2d 48, 88 S.Ct. 234.

In *State v. McLeod*, supra, the Ohio court attempted to limit the scope of *Massiah* to statements deliberately elicited by interrogation of an accused by an informer. This is the same limitation the state would have us adopt in the present case. The high court's reversal of the narrow interpretation by the Ohio court cites *Massiah* as sole authority for the exclusion of a spontaneous, voluntary post-indictment confession made to the informer.

In *Beatty v. United States*, supra, the 5th Circuit Court of Appeals had held that statements made by an accused to an informer were voluntary and admissible since they had not been induced by the informer. The United States Supreme Court reversed in a memorandum opinion citing *Massiah* in support thereof.

After reviewing both federal and state cases on the question it is clear that interrogation or the lack of it does not determine the admissibility question. When the police or other state officers surreptitiously place a defendant in a cell with an informer for the purpose of obtaining information concerning pending charges in the absence of counsel, such action by the police contravenes the basic dictates of fairness in the conduct of criminal causes and violates the fundamental rights afforded by the presence of counsel.

The testimony of a police informer concerning incriminating statements made by the defendant while in jail pending charges is not admissible at defendant's trial if the information has been surreptitiously obtained by prior arrangements between the police and the informer.

It should be understood in this case we do not question that it is entirely proper to continue an investigation of the suspected criminal activities of the defendant after a criminal prosecution has been commenced. Law enforcement officials have the right and the duty to use all information that comes into their hands pointing to the guilt of an accused. This is true even though the informer may harbor expressed or unexpressed motives such as an expectation of lenient treatment. It is only when the state actively engages in prior arrangements with an informer to obtain desired information in contravention of constitutionally protected rights that the sanction of suppression of the evidence is applied. The surreptitious arrangement which undercuts the right to counsel by the use of a secret informer is the evil sought to be removed. A police officer seeking information under similar cir-

cumstances would be required to inform the accused of his right to counsel and not proceed further until the accused knowingly and voluntarily waived such right. The whole purpose of the state in using a secret informer is to avoid that which is required of a police officer. What the state may not do directly to secure evidence, it cannot do indirectly. Such unfair tactics, if permitted, would override the individual's constitutionally based rights. (*Evalt v. United States*, 359 F.2d 534 [9th Cir. 1966]; *State v. Smith*, 107 Ariz. 100, 482 P.2d 863; *Commonwealth, Appellant v. Bordner*, 432 Pa. 405, 247 A.2d 612; *State v. Atkins*, 251 Or. 485, 446 P.2d 660.)

In the present case David Elliott was selected in advance by the police to obtain information about the Williams' murder. McCorgary was placed in a cell with Elliott pursuant to prior arrangement. This occurred after his arrest on complaint and warrant, the criminal prosecution had been commenced and an attorney had been appointed for him. Under these circumstances, the testimony of the police informer as to incriminating statements made by the defendant while in jail pending charges is not admissible at the defendant's trial. The admission of Elliott's testimony in this case constitutes reversible error.

Several additional points are raised which merit attention since the case must be remanded for a new trial.

Appellant contends that he was denied a fair trial by the decision of the trial court which permitted the jury to view the scene of the crime. He asserts that the view was calculated to play upon the emotions of the jury. The state argues that the view was necessary

so that the jury might better understand the testimony of certain witnesses.

K.S.A. 22-3418 provides:

"Whenever in the opinion of the court it is proper for the jurors to have a view of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. They may be accompanied by the defendant, his counsel and the prosecuting attorney. While the jurors are thus absent, no person other than the officer and the person appointed to show them the place shall speak to them on any subject connected with the trial. The officer or person appointed to show them the place shall speak to the jurors only to the extent necessary to conduct them to and identify the place or thing in question."

The trial court fully complied with the guidelines established in K.S.A. 22-3418 and instructed the jury regarding the limited purpose of its visit to the scene of the crime. It is discretionary as to whether a trial court shall permit a jury in a criminal case to view the scene of a crime. This court will not reverse such a decision of the trial judge except for an abuse of discretion which affirmatively appears to have affected the substantial rights of the party complaining (*State v. Winston*, 214 Kan. 525, 530, 520 P.2d 1204.)

The appellant has made no affirmative showing that the jury was prejudiced by its view of the scene. Even though photographs of the scene were admitted

into evidence and were available for the jury's inspection, it can be said that a view of the physical surroundings of the steel plant would further enlighten the jury concerning the testimony of witnesses at the trial. It does not appear that the trial judge abused his discretion by granting the view.

Appellant next argues that the court erred in instructing the jury that "flight" might be taken into account upon the question of the consciousness of guilt of the defendant. The full text of the instruction challenged by appellant reads as follows:

"You are instructed that flight, concealment, fabrication of evidence or the attempt to fabricate evidence or the giving of false information may be taken into account upon the question of the consciousness of guilt of the defendant. Therefore, if you find from the evidence that a defendant soon after the commission of an offense alleged in the Information fled to avoid arrest and trial, fabricated evidence in his behalf, sought to create a false alibi, or give false information in his behalf, you may take such facts and circumstances into consideration in determining his guilt or innocence. Flight, concealment, fabrication, use of a false name and fabrication of evidence are admissible as circumstances which you may consider in determining the probabilities of the guilt or innocence of the defendant. The weight of such circumstances is a matter for the jury to determine in connection with the other facts and circumstances in the case."

Appellant relies on *State v. Floyd*, 210 Kan. 383, 502 P.2d 744, which holds that it is improper to in-

struct a jury on flight to escape arrest and trial without evidence of such flight. In the present case, as in *Floyd*, there was no evidence which indicated that appellant attempted to flee following Williams' murder. The evidence clearly shows the contrary. McCorgary remained in Wichita and continued his employment at Pinsky Steel until the time of his arrest.

The instruction quoted above is overly broad. Flight was not in issue at appellant's trial. Among the several types of conduct enumerated by the trial court in its instruction, the evidence showed that appellant may have given false information concerning Williams' whereabouts, that he may have concealed evidence by washing out Williams' auto following the crime and that the body was buried. It has been held improper to instruct the jury upon matters which are not in evidence, even though the instruction correctly states the law. (*State v. Floyd*, supra, at p. 388, and *State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397.)

Evidence to establish the defendant's consciousness of guilt such as flight, concealment, fabrication of evidence or the giving of false information is admissible in a criminal case. (*State v. Norwood*, 217 Kan. 150, 535 P.2d 996; *State v. Donahue*, Kan. P.2d (No. 47,810, this day decided.) However, we disapprove of giving an instruction which emphasizes and singles out certain evidence admitted at a criminal trial. The weight of all evidence should be left to the jury and special emphasis should not be given in the instructions. The instruction as to flight in this case was improper since no evidence of flight was introduced. In any subsequent trial of this defendant we direct that the entire instruction on con-

sciousness of guilt be omitted from the instructions to the jury.

Appellant further contends the trial court should have instructed the jury on the lesser included crimes of theft and manslaughter. The rule requiring an instruction on lesser included offenses as codified in K.S.A. 21-3107 (3) becomes applicable only when such an instruction is called for by the evidence and when the jury might well convict the accused of the lesser crime. (*State v. Harris*, 215 Kan. 961, 962, 529 P.2d 101, and *State v. Schoenberger*, 216 Kan. 464, 468, 532 P.2d 1085.) Here no evidence was presented which indicated that appellant killed Williams in the heat of passion or that Williams' property was taken other than forcibly.

Appellant suggests that the verdicts returned against him by the jury were inconsistent. He notes that the trial court instructed the jury on the crimes of premeditated murder in the first degree, felony murder in the first degree and second degree murder. The jury was also instructed on the crime of aggravated robbery. Appellant reasons that the verdicts which convicted him of aggravated robbery and second degree murder are inconsistent because under the instructions a conviction for aggravated robbery would logically carry with it a conviction for felony murder, not second degree murder.

A simple answer to appellant's argument is that the jury may have found that the robbery occurred before the murder as a separate incident. Under those circumstances no inconsistency in the verdicts appears. However, in response to challenges by other defendants asserting that verdicts were inconsistent, this court

has observed that where a jury relieves a defendant of punishment for a greater offense (felony murder) and convicts him of a lesser included offense (second degree murder) the jury may have adopted its conclusion as an act of clemency. In such a case the defendant cannot complain because the error does him no harm. (*State v. Brundige*, 114 Kan. 849, 852, 220 Pac. 1039.)

Even so it has been noted by this court that the conduct of a jury is sometimes devoid of logic, and inconsistent verdicts may result. Even in cases where the two verdicts are irreconcilable the convictions will not be reversed on grounds of inconsistency. (*State v. Murphy*, 145 Kan. 242, 65 P.2d 342, and *State v. Ogden*, 210 Kan. 510, 502 P.2d 654.)

Appellant next argues that the jury should have been instructed on the defense of intoxication. In *State v. Seely*, 212 Kan. 195, 510 P.2d 115, it is said:

"A criminal defendant is, of course, entitled to an instruction on his theory of defense if it is supported by any evidence whatever. *State v. Severns*, 158 Kan. 453, 148 P.2d 488, Syl. ¶ 4; *State v. Osburn*, 211 Kan. 248, 505 P.2d 742; *State v. Fitzgibbon*, 211 Kan. 553, 507 P.2d 313. On the other hand, there must be evidence which, viewed in the light most favorable to the defendant, would justify a jury finding in accordance with the defendant's theory. *State v. Hamrick*, 206 Kan. 543, 479 P.2d 854; *State v. Harden*, 206 Kan. 365, 480 P.2d 53, Syl. ¶ 5." (p. 197.)

In this case there was no evidence that appellant was intoxicated at the time the crime occurred. There-

fore he was not entitled to an instruction on intoxication.

Appellant contends the trial court erred by overruling his motion for a change of venue. He claims that publicity in the Wichita newspapers prevented a fair trial. Appellant has included several news articles in the record as evidence of the prejudice generated against him prior to trial.

K.S.A. 22-2616 (1) governs motions for change of venue:

"In any prosecution, the court upon motion of the defendant shall order that the case be transferred as to him to another county or district if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county."

A change of venue in a criminal case lies within the sound discretion of the trial court whose ruling will not be disturbed when there is no showing of prejudice to the substantial rights of the defendant. (*State v. Colin*, 214 Kan. 193, 198, 519 P.2d 629.) The publication of newspaper articles in the local papers does not establish prejudice *per se*. (*State v. Randol*, 212 Kan. 461, Syl. ¶ 1, 513 P.2d 248.) The burden of proof is cast upon the defendant to show prejudice in the community, not as a matter of speculation but as a demonstrable reality. (*State v. Cameron & Bentley*, 216 Kan. 644, 646, 533 P.2d 1255.)

In this case McCorgary presented only newspaper articles in support of his motion for change of venue. No evidence or affidavits were introduced to establish

what effect this publicity might have had on prospective jurors. No affirmative evidence that prejudice existed in the community was introduced. The trial court properly denied the motion for change of venue under those circumstances. (*State v. Eldridge*, 197 Kan. 694, Syl. ¶ 2, 421 P.2d 170, cert. den. 389 U.S. 991, 19 L.Ed.2d 483, 88 S.Ct. 486.)

Appellant argues that the trial court erred by overruling his motion for acquittal. Judgment of acquittal on the court's own motion or on the motion of the defendant is provided for in K.S.A. 22-3419. This statute was construed and the tests to be applied by the trial court in passing upon a motion for judgment of acquittal are set out in *State v. Gustin*, 212 Kan. 475, 510 P.2d 1290. In *Gustin* it was held:

"A trial judge in passing upon a motion for judgment of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes guilt beyond a reasonable doubt is a fairly possible result, he must deny the motion and let the jury decide the matter. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion." (Syl. ¶ 3.)

We have carefully examined the evidence appearing in the record and after excluding the testimony of David Elliott, the police informer, we find substantial evidence to support the charges. Guilt beyond a reasonable doubt was a fairly possible result. The trial court did not err by overruling defendant's motion for acquittal.

In his final point appellant argues the trial court improperly limited cross-examination of David Elliott, the police informer. Since we hold the entire testimony of David Elliott should be suppressed this point need not be discussed.

In conclusion we note that the body of Karl Williams was discovered by the police independently of the statements made by the appellant to David Elliott. A fellow worker advised the police of appellant's nervous reactions on several occasions when there was activity in the area of the grave site. This lead the police to the location of the body. It was thereafter appellant broke down and admitted his guilt and advised Elliott of the location. On a subsequent trial the suppression of evidence here ordered extends only to the testimony of David Elliott. The location of the body and the evidence afforded thereby is not the "fruit of a poisoned tree".

We further note that appellant was charged with first degree murder and convicted of the lesser offense of second degree murder. As to these two offenses a conviction of the lesser offense is an acquittal of the greater degrees of the offense. See *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705, 58 A.L.R.3d 522, and cases cited at p. 490 of the opinion.

The judgment and sentences are reversed and the case is remanded with directions to grant the appellant a new trial on the lesser included offense of second degree murder and on the offense of aggravated robbery in accordance with the foregoing opinion.

Fatzer, C. J., dissenting.

APPENDIX B

No. 47,813

IN THE
SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,

v.

Thomas Leo McCorgary, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellee is considered and DENIED.

Yours very truly,

LEWIS C. CARTER

Clerk, Supreme Court

Date January 28, 1976